RIGHTS STUFF

A Publication of The City of Bloomington Human Rights Commission

City of Bloomington

October 2009

Volume 123

Rehabilitation Act Does Not Require Giving Full-Time Employee A Part-Time Schedule

Joseph Clemens worked for the U.S. Navy as a firefighter for less than a month. He requested an alternative work schedule to accommodate a disability. Instead, the Navy sent him home until a doctor said he could return to work. Mr. Clemens did not return to work, so the Navy fired him, and he sued, alleging that the Navy had violated the Rehabilitation Act of 1973 (similar to the Americans with Disabilities Act). He lost his lawsuit.

Before taking the firefighter job, Mr. Clemens was working for the Navy as an emergency equipment dispatcher. In June, 2003, he requested leave for an unspecified medical condition. While still on leave, he applied for a firefighter job with the Navy. As part of the application process, he affirmed that he had no "medical disorder or physical impairment which would interfere in any way with the full performance of the duties" of a Navy firefighter. A Navy doctor cleared him to work as a firefighter.

Mr. Clemens' supervisor for the dispatch position found out that he was applying for a firefighter position while on medical leave from his dispatch job. The supervisor believed the requirements for the firefighter position were more stringent than the dispatcher position, and changed Mr. Clemens' status from leave-without-pay to absent without leave. Mr. Clemens, concerned that his former supervisor would keep him from getting the firefighter job, sought and was granted a meeting with the firefighter commander and told the commander that he had no impairment that would keep him from doing the job of a firefighter. He told the commander that he had depression, but that he could do the firefighter job without an accommodation.

The Navy hired Mr. Clemens as a firefighter, and he began his new job on March 7, 2004. Ten days later, he told his new supervisor that he had a disability that caused sleeping problems and that he thus needed to work only eight-hour days and forty-hour weeks. His doctor certified that he "suffered from chronic depression and was incapacitated now and will be for the next year for all jobs except firefighter/supervisor position," a distinction the Court called "peculiar." None of the various medical documents that Mr. Clemens provided discussed the medical bases for the opinions.

The Court said that Mr. Clemens did not demonstrate that he was a "qualified individual with a disability." The Court said that depression may be a disability as that term is defined by law, but only if it creates a substantial impairment for the individual. While Mr. Clemens testified he had problems sleeping, getting a "tough night's sleep" is not enough to establish a disability. His own testimony showed that his "inability to sleep does not significantly impact his wakeful activities." He said he didn't have to have an accommodation, but having one "would make my life easier" and would "simplify my life."

The Navy submitted evidence that

(Continued on Page 4)

BHRC
PO BOX 100
Bloomington IN
47402
349-3429
human.rights@
bloomington.in.gov

Current Alcoholism Not A Disability

Terri Nicholson worked for Allegheny Specialty Practice network as a registered nurse. In January, 2005, she was a victim of a violent crime. As a result, she suffered from post-traumatic stress disorder and depression. She sought treatment for her condition, including medication, and also resorted to alcohol. She showed up at her supervisor's house several times in an intoxicated state. Her supervisor told the network's human resources department about Ms. Nicholson's problems with alcohol.

In April of 2005, Ms. Nicholson began asking for medical leave, and Allegheny granted each request. After one of her medical leaves ended, in June of 2005, she met with people from human resources and signed a last chance agreement. By signing the agreement, she said she understood that if she consumed alcohol again, she could be terminated.

In February, 2006, Ms. Nicholson consumed alcohol and telephoned a co-worker while she was under the influence. She was then admitted to a hospital and was granted additional medical leave. In March, she was fired for having violated the last chance agreement by consuming alcohol.

Ms. Nicholson sued, alleging that Allegheny had violated both the Rehabilitation Act (very similar to Americans with Disabilities Act) and the Family and Medical Leave Act when it fired her. She eventually dropped her FMLA claim but pursued her Rehabilitation Act claim.

Both the District Court and the Court of Appeals found for Allegheny. The courts said that Ms. Nicholson failed to establish that she had a disability as the law defines that term. The ADA says that to meet the legal definition, the plaintiff has to show that she has a physical or mental impairment which substantially limits one or more of her major life activities, or has a record of such an impairment, or is regarded as having such an impairment.

The courts said that Ms. Nicholson did not show that her PTSD, her depression and/or her alcohol abuse substantially limited any of her major life activities. She testified that her depression and PTSD invoked "flashbacks" and "intrusive thoughts," but this was not enough to satisfy the law's "demanding standard for qualifying as disabled." She said that her conditions prevented her from working, noting that Allegheny had provided her with medical leave. But the courts said that qualifying for FMLA is not the same as qualifying as a person with a disability. She did not show that her conditions kept her from doing a wide variety of jobs; indeed, by the time of her testimony, she was working full-time as a registered nurse for another health care facility.

Ms. Nicholson tried to argue that Allegheny regarded her as having a disability. The record showed that Allegheny may have regarded her as being an alcoholic, but being an alcoholic whose current abuse of alcohol was keeping her from doing her job is specifically exempted from the definition of having a disability under the Rehabilitation Act and under the ADA.

The case is Nicholson v. West Penn Allegheny Health System, 297 Fed. Appx. 157 (3rd Circuit 2008). ♦

Settlement Reached In Customer Preference Case

The U.S. Equal Employment Opportunity Commission has reached a settlement with Preferred Labor LLC, a national employment agency chain.

The EEOC charged that Preferred Labor restricted female employees to a narrow range of assignments. The agency said that Preferred Labor complied with requests from its clients for male-only temporary employees. The acting chairman of the EEOC, Stuart J. Ishimaru, said "This settlement is a stark reminder to businesses: A customer's preference to be staffed or served only by workers of a particular gender is never an excuse to engage in illegal discrimination."

Under the settlement decree, Preferred Labor will pay $250,000 to women who were affected by its discriminatory practices. The settlement was reached after Preferred Labor sold its entire temporary day labor business to another employment agency. If Preferred resumes conducting business as a temporary day labor agency, it is enjoined from engaging in discriminatory practices in the future and will be required to conduct anti-discrimination training for its employees. ♦

AT&T And Religious Discrimination

Jose Gonzalez and Glenn Owen, brothers-in-law, are both members of the Jehovah's Witness faith and both worked for AT&T as customer service technicians. Their job duties included installing new phone and high-speed internet lines and responding to customer complaints about telephone outages.

Each year, both Mr. Gonzalez and Mr. Owen attend a Jehovah's Witness convention as part of practicing their faith. In 2005, the convention was scheduled for July 15-17, which meant both men needed to have Friday, July 15, off of work. They submitted multiple written and verbal requests to their manager, Jacob Garrett, for the day off. After reviewing the workload information and considering other factors, Mr. Garrett told Mr. Gonzalez and Mr. Owen that they could not have the day off. He suspected they might just not come in that day, so he told them to come to work or face serious consequences. The union president told them the same thing.

They both missed work on July 15, leading to their being suspended and then terminated. They then filed complaints with the Equal Employment Opportunity Commission, alleging that AT&T had denied them a reasonable accommodation of their religious needs.

AT&T moved for a summary judgment, saying that it would have been an undue hardship to the company to let them have the day off as they had been allowed to have convention days off in previous years. (Mr. Gonzalez had been with the company for more than eight years and Mr. Owen had been with the company for almost six years.) The Court denied AT&T's motion, saying there was evidence that more than one employee had missed work on other days without causing an undue burden and that there was no evidence that customers complained about the quality of their phone service on July 15. The extra pay AT&T had to give to the employees who filled in for the two absent men amounted to either $441.44 or $882.88, arguably not an undue burden for a company the size of AT&T.

That decision was back in 2007, Equal Employment Opportunity Commission v. Southwestern Bell Telephone d/b/a AT&T Southwest, 2007 WL 2891379 (E.D. Ark. 2007). After AT&T lost its motion for summary judgment, the case went to trial, and that fall the jury awarded the two men $296,000 in back pay and $460,000 in compensatory pay. The company appealed the jury finding to the Court of Appeals, where it lost. With the inclusion of interest and front pay, the amount of the judgment rose to $1,307,597 by the time it was paid in July, 2009.

The EEOC Supervisory Trial Attorney, William A. Cash, Jr., said about the case, "These were two outstanding employees who simply should have been allowed to attend the Jehovah's Witness Convention as they had done during their employment with AT&T. When employers or management officials attempt to make an example out of employees by discriminating against them, as was done in this case, there is a high price to pay." ♦

Walmart Settles ADA Complaint

The U.S. Department of Justice recently announced that it had entered into a settlement agreement with Walmart Stores, Inc. Customers complained that Walmart had refused to admit some service animals or had excessively questioned customers with service animals. Under the terms of the settlement agreement, Walmart will do the following:

- Adopt and implement a new policy on service animals;
- Provide training on the new policy for all Walmart associates who have contact with the public;
- Provide additional training on the new policy for store management and greeters;
- Post the new policy on its website and in employee areas at its stores;
- Provide training for managers and greeters on their legal obligations under the ADA to maintain accessible features and to make reasonable modifications in policies, practices and procedures when needed to accommodate customers with disabilities; and
- Establish a grievance procedure under which Walmart will receive ADA complaints through a toll-free hotline, investigate the complaints and take appropriate corrective action to resolve ADA violations.

Walmart also will pay $150,000 into a fund to compensate people who had filed complaints and $100,000 into a fund to finance a public service campaign to increase public awareness of people with disabilities who use service animals. ♦

Dance To Live, Live To Love Benefit

Dance to Live, Live to Love is a benefit to celebrate the release of Live to Love by Craig Brenner & the Crawdads. The event is part of The Art of Mental Health 2009. It benefits Mental Health America of Monroe County.

When: October 10, 2009, 7:30 p.m.
Where: Bloomington Convention Center, 302 S. College Avenue
Tickets: $15, available at the event and at the Buskirk-Chumley ticket office. Admission includes desserts by some of Bloomington's finest local restaurants.

At the event, folks can dance to live music by Craig Brenner & the Crawdads. The event is co-sponsored by Centerstone, Inc. and Bloomington Hospital and underwritten by WTIU, WFIU, Craig Brenner & the Crawdads, Bloomingfoods and an anonymous donation.

For information please call 812-339-1551 or go to www.artofmentalhealth.org. ♦

Race In The Age Of Obama

WTIU is sponsoring a symposium entitled "Race in the Age of Obama." It will be held on Wednesday, October 21, at 7 p.m. in the Wittenberger Auditorium in the Indiana Memorial Union. Cosponsors of the event are Union Board and Diversity Education.

For more information, contact Shameka Neely, 856-5744 or shyneely@indiana.edu. ♦

Rehabilitation Act

(continued from page 1)

allowing Mr. Clemens to work a standard 40-hour week instead of three 24-hour shifts would create both logistical and financial burdens for them. The Court said, "A part-time schedule is not a reasonable accommodation for a full-time job and that, in essence, is what Clemens sought."

The case is Clemens v. Winter, 2008 WL 4874131 (N.D. Ill. 2008). ♦

City of Bloomington
Human Rights Commission
PO Box 100
Bloomington IN 47402